# THE JURISDICTION OF STATE AND FEDERAL COURTS OVER FEDERAL OFFICERS.

The development of the law relating to the control which Federal and State courts respectively may exercise over Federal officers is both historically and intrinsically interesting.

When, immediately after the adoption of the Federal constitution, Congress passed the Judiciary Act[1] establishing the inferior Federal courts, and prescribing their jurisdiction, it did not attempt to confer upon them the entire judicial power vested in the government by the constitution.[2] It did not give either the district or circuit court general jurisdiction of causes arising under the constitution, laws or treaties of the United States, although, under the constitution, the Federal judicial power might then have been thus extended, as it since has been; nor did it give those courts cognizance of suits or proceedings against Federal officers arising out of their official acts except as the circuit court was given jurisdiction by reason of diverse citizenship. The theory of that legislation seems to have been that remedies against Federal officers were to be enforced in the State courts except when in case of diverse citizenship the circuit court had concurrent jurisdiction,[3] and that supervision by the national government could be sufficiently exercised by writ of error from the highest court of the State to the Supreme Court of the United States when the decision of the State court was adverse to a claim of right or immunity by a Federal officer under the Federal constitution. The reason the grant of original jurisdiction to the Federal courts was thus limited is to be found to a large extent in the sensitiveness of the several States upon questions affecting their sovereignity. No doubt considerations of convenience, arising from the difficulties of travel to centres at which the Federal courts were held, may also have had their influence. At any rate, early legislation shows a tendency to make use of the State courts for Federal business. Thus, among the first statutes for the collection of duties, jurisdiction was expressly conferred upon the State courts in actions for fines

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[1]Laws 1789, c. 20; 1 Stat. L. p. 73.

[2]Kendall *v.* United States (1838) 12 Pet. 524, 617, 618; *Ex parte* Cabrera (1805) 1 Wash. C. C. 232; Tennessee *v.* Davis (1879) 100 U. S. 257.

[3]Elliott's Debates, p. 526; Madison's Papers, 798-799; *In re* Tarble (1870) 25 Wis. 390, 404; Hamilton's Works (Lodge) Vol. 1, p. 332.

and penalties,[4] and by the thirty-third section of the Judiciary Act, an offender could be arrested, imprisoned and bailed for any crime or offense against the United States by any justice of the peace or other magistrate of any of the United States where he might be found, agreeable to the usual mode of process against defendants in such State;[5] and this continues to be the law.[6]

So, the Fugitive Slave Law of Feb. 12, 1793, provided for its enforcement not only by judges of the circuit and district courts of the United States, but also by magistrates of counties, cities or towns.[7] So also, the naturalization law passed in 1790 empowered every common law court of record in any State to admit aliens to citizenship but gave no such authority to any court of the United States.[8] This disposition in the early days of the Republic to extend the Federal jurisdiction to State as well as Federal courts, although now almost a thing of the past, is important to a clear understanding of the subject we have under consideration.

When we come to the great prerogative writs, it will be found that the jurisdiction of the Federal courts was also at first very limited, and as to some of them the limitations still remain. The courts of the United States were by the Judiciary Act given power to issue the writs of scire facias, habeas corpus, and all other writs which might be necessary for the exercise of their respective jurisdictions, but it was early decided, and has since remained the undisputed law, that under this grant of power no court of the United States has jurisdiction to issue the writ of mandamus or certiorari as an original writ, but only as ancillary to jurisdiction

[4]Laws of 1794, c. 49, Sec. 9; see also Act of Aug. 2, 1813, held to be unconstitutional in U. S. *v.* Lathrop (N. Y. 1819) 17 Johns. 4; Ely *v.* Peck (1828) 7 Conn. 239.

[5]U. S. Comp. St. § 1014.

[6]See Robertson *v.* Baldwin (1897) 165 U. S. 275, 278; citing State *v.* Rutter (1817) 12 Niles Reg. 115, 231, holding that Congress could not confer this power; *Ex parte* Rhodes (1817) 12 Niles Reg. 264, *contra.*

[7]In Prigg *v.* The Commonwealth of Pennsylvania (1842) 16 Pet. 539, it was held that while it was doubtful whether such magistrates were bound to act under direction of a Federal statute, yet if they so chose they might act unless prohibited by State law. See Robertson *v.* Baldwin (1897) 165 U. S. 275, 279, 280. But in this respect there seems to be a distinction between the trial and determination of cases and other judicial and administrative acts, for while State courts may not be empowered to exercise the functions of Federal judiciary in the first class of cases, it seems that they may be in the second. Robertson *v.* Baldwin, *supra;* Martin *v.* Hunter's Lessee (1816) 1 Wheat 304.

[8]1 Stat. L. 103. This jurisdiction though said to be doubtful has become settled by practice. Levin *v.* U. S. (1904) 128 Fed 826.

already obtained.[9] It was also held that Congress had no power to confer jurisdiction upon the Supreme Court to issue these writs except as part of its appellate jurisdiction.[10] So that it has never been competent, except in the instance to which we shall presently refer, for any court of the United States, by original writ, to compel a Federal officer by mandamus to perform an official duty, or, by certiorari, to review acts of Federal officers or boards unless the duties or acts which the court sought to enforce or review were in aid of a judicial authority otherwise invoked.[11] Moreover, although the Federal courts are thus rendered powerless to control Federal officers by the writs of mandamus and certiorari, the State courts are equally powerless, since the Supreme Court at an early day declared the law to be that a State court has no jurisdiction to issue a mandamus to an officer of the United States, and this is the law also as to certiorari.[12]

The omission to extend the operation of these writs, with all their original vigor, to the Federal courts was due primarily to the sensitiveness referred to above, and doubtless in part also to the belief that the functions of Federal civil officers would be of so circumscribed and limited a character that the exercise of the powers of the court through these writs was not called for. This omission might have occasioned greater embarrassment than has in fact arisen from it, had it not been judicially determined that the courts of the District of Columbia were vested with the power to issue these writs by the adoption and continuance in the District by Congress of the laws of the State of Maryland in force in 1801.[13] So that Federal officials within the jurisdiction of the courts of the District are amenable to these writs, and numerous instances have arisen in which the courts of the District have resorted to them in cases where they were applicable at common law; but it still re-

[9]Riggs *v.* Johnson Co. (1867) 6 Wall. 166; McIntire *v.* Wood (1813) 7 Cranch 504; Rosenbaum *v.* Bauer (1887) 120 U. S. 450; Bath Co. *v.* Amy (1871) 13 Wall. 244; Mystic Mill Co. *v.* C., M. & St. P. Ry. Co. (1904) 132 Fed. 289; Burnham *v.* Fields (1907) 157 Fed. 246.

[10]Marbury *v.* Madison (1803) 1 Cranch 137; see Kendall *v.* United States (1838) 12 Pet. 524, 651. As to the appellate jurisdiction of Supreme Court, *Ex parte* Crane (1831) 5 Pet. 190; *In re* Massachusetts (1905) 197 U. S. 482.

[11]U. S. *v.* Plumer (1859) 3 Cliff. 28; *Ex parte* Van Orden (1854) 3 Blatch. 166; U. S. *v.* Circuit Court (1903) 126 Fed. 169.

[12]M'Clung *v.* Silliman (1821) 6 Wheat. 598; see also Ladd *v.* Tudor (1847) 3 Wood. & M. 325, Fed. Cas. No. 7975.

[13]Kendall *v.* United States (1838) 12 Pet. 524; United States *v.* Schurz (1880) 102 U. S. 378.

mains true that with the exception of the District of Columbia and of the territories where legislative power has been specifically conferred, the remedies by mandamus and certiorari are practically unavailable against Federal officers either in the Federal or State courts.

The writ of habeas corpus, on the contrary, has become one of the means made use of by the Federal courts to protect officers of the United States in the discharge of their duties.[14] The State courts, however, also assumed and exercised the power by the use of this writ to discharge persons restrained of their liberty by Federal officers when in the judgment of the State court such restraint was illegal. The jurisdiction of the Federal courts in the use of this writ has been gradually enlarged, while the State courts have finally abandoned the claims which for many years they vigorously asserted. The history of legislation and decision in each of these directions is noteworthy, and justifies a somewhat extended examination.

While, as we have seen, the courts of the United States were given, by the Judiciary Act, the power to issue writs of habeas corpus, yet that act also provided that such writs should not extend to persons in jail unless they were in custody under or by color of the authority of the United States,[15] and since the United States courts had no power to issue the writ except by statute,[16] prisoners in confinement by order of State authorities were left without the benefit of this writ from the courts or judges of the United States courts.[17] Hence, Federal officers if arrested or confined by commitments from State courts, while in the actual discharge of official duties, were without redress in the Federal courts. That this condition of affairs was inconsistent with the paramount authority of the constitution and laws of the United States became very apparent when the State of South Carolina attempted to nullify the tariff acts of 1828 and 1832. The famous ordinance of nullification was adopted at a State convention held in November, 1832, and immediately afterward the legislature passed an act[18] prescribing, among other things, fines and imprisonment for an attempt to enforce the obnoxious laws. Thereupon Congress passed what is known as

[14] *In re* Neagle (1889) 135 U. S. 1; see *infra*, p. 409.

[15] Laws of 1789, c. 20, Sec. 14.

[16] *Ex parte* Bollman and Swartout (1807) 4 Cranch 75, 94.

[17] *In re* Burrus (1890) 136 U. S. 586.

[18] Laws of S. C., 1832, c. 3; State *ex rel.* M'Cready *v.* Hunt (S. C. 1834) Hill's Reports, Part I, Vol. 2, p. 1.

the "Force Bill" [19] which conferred jurisdiction upon the Circuit Court of the United States in all cases in law or equity arising under the revenue laws of the United States, and provided that if any person received an injury to his person or property for or on account of any act done by him under any law of the United States for the protection of the revenue or the collection of duties on imports, he should be entitled to sue for damages in the Circuit Court, and also provided for the removal into that court of actions commenced in a court of a State against an officer of the United States, or any other person for or on account of any act done under the revenue laws of the United States or under color thereof. This act was not called into operation in the particular instance for which it was primarily intended, since the adoption by Congress of the Clay compromise tariff act in March, 1833, put an end to the disagreement between the State of South Carolina and the Federal government on the tariff question. It is of passing interest, however, to note that although the ordinance of nullification was repealed by the South Carolina State convention in March, 1833, yet the same convention undertook to nullify the "Force Bill" itself. This latter attempt at nullification called for no action and ended merely in words.

The "Force Bill" thus became an integral part of the Federal jurisdiction and has since been extended to cases arising under the internal revenue laws, and also under the postal laws.[20] It was not repealed by the Jurisdictional Act of 1875.[21] The scope of the act as to the removal of causes into the Federal courts, however, is limited to the power granted to Congress to lay and collect taxes, duties, imports and excises, and it cannot therefore be given an application to Federal officers other than those acting pursuant to revenue laws enacted by Congress within this authority.[22]

The power of removal both of criminal and civil prosecutions against revenue officers under this act has been held to be constitutional.[23] The difficulty and supposed incongruity of conducting a

[19]Laws of March 2, 1833, 4 Stat. L., p. 632.

[20]U. S. Comp. St. § 629, subds. 4, 12; Law of July 13, 1866, c. 185, §§ 9, 14, 19; Tennessee *v.* Davis (1879) 100 U. S. 257; Venable *v.* Richards (1881) 105 U. S. 636; Warner v. Fowler (1859) 4 Blatch. 311; Ward v. Congress Con. Co. 1900) 99 Fed. 598; McCullough *v.* Large (1884) 20 Fed. 309.

[21]Downs *v.* Bidwell (1901) 182 U. S. 244, 248; Spreckels Sugar Refining Co. *v.* McClain (1904) 192 U. S. 397, 407.

[22]United States *v.* Hill (1887) 123 U. S. 681.

[23]Tennessee *v.* Davis (1879) 100 U. S. 257; Virginia *v.* Paul (1893) 148 U. S. 107.

criminal prosecution instituted in a State court upon removal into the Circuit Court of the United States in accordance with the procedure and law of the State was urged as an argument against the right of removal in *Tennessee* v. *Davis*[23] and in other cases; but this contention was met by the declaration that the circuit courts of the United States have all the appliances which are needed for the trial of any criminal case, and that they can and will adopt and apply the laws of the State in administering the State's criminal law.[24]

The change made by the "Force Bill" as to the jurisdiction in habeas corpus was more extensive. It provided that judges of the United States courts might issue the writ

"In all cases of a prisoner or prisoners, in jail or confinement, where he or they shall be committed or confined on, or by any authority or law, for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree, of any judge or court thereof, anything in any act of Congress to the contrary notwithstanding." [25]

This provision has been twice extended; first, by the statute of August 29, 1842[26] to cases where the prisoner claims that the act for which he is held in custody was done under the sanction of a foreign power, and where the effect and validity of the plea depends upon the law of nations, and again, by the statute of February 5, 1867[27] to cases of a prisoner in custody in violation of the constitution or a law or treaty of the United States. The statute as amended is cited in full below.[28]

The clause "in custody for an act done or omitted in pur-

[23]Tennessee *v.* Davis, *supra;* State of Virginia *v.* Felts (1904) 133 Fed. R. 85; Davis *v.* South Carolina (1882) 107 U. S. 597; Findley *v.* Satterfield (1877) 3 Woods 504.

[25]Act of March 2, 1833, Sec. 7; 4 Stat. L. 634.

[26]5 Stat. L. 539.

[27]14 Stat. L. 385.

[28]U. S. Comp. St. § 753: "The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign State, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."

suance of a law of the United States or of an order, process, or decree of a court or judge thereof"[28] refers to a distinct class of cases, including a Federal officer held by a State court for an act done or omitted pursuant to Federal authority. In such a case it is the authority under which the accused acts which is the subject of investigation, and the occasion for granting relief, whereas the other clause "in custody in violation of the constitution or a law or treaty of the United States," added in 1887, is aimed at the invalidity of the law or process under which the accused is held, as being in conflict with the constitution, laws or treaties of the United States. The clause last referred to, therefore, generally presents a question of which the State and Federal courts have concurrent jurisdiction, since a State court may determine whether the law or process under which the party claims, or under which a claim is made against him, violates the constitution, laws or treaties of the United States. In all such instances, therefore, when a person seeks relief by habeas corpus out of a Federal court on the ground that he is held by a State court in violation of the constitution, laws or treaties of the United States, the Federal court may exercise its discretion and grant the relief sought or leave the petitioner to urge his plea in the State court, and, if unsuccessful there, to appeal to the Supreme Court. And this discretion will be exercised in favor of the latter course unless there is some urgency calling for prompt action.[29]

But where an officer of the United States government is imprisoned for an offense alleged to have been committed against the law of a State, and he claims that the alleged offense consists of an act done by him in pursuance of a law of the United States, or of a process of its courts, a very different situation is presented. Then the questions on habeas corpus are whether the State has power to imprison a Federal officer for an act done under Federal authority, and, if there be uncertainty, whether the officer has exceeded his authority, whether the Federal judge on habeas corpus may hear and determine that question upon evidence taken before him.

Before considering these problems, it may be well to look at the other line of cases, to which we have referred, as to the power

[28] *Ex parte* Royall (1886) 117 U. S. 241; Minnesota *v.* Brundage (1901) 180 U. S. 499; Boskie *v.* Comingore (1907) 117 U. S. 459, 466; Whitten *v.* Tomlinson (1895) 160 U. S. 231; Fells *v.* Murphy (1906) 201 U. S. 123; Valentina *v.* Mercer (1906) 201 U. S. 131; Urquhart *v.* Brown (1907) 205 U. S. 179.

of a State court on habeas corpus to discharge a prisoner from the custody of a Federal officer on the ground that the restraint is illegal. Here we come upon a long, and, at times, a bitter legal conflict. The question was first raised in the *Matter of Ferguson*[30] in the Supreme Court of New York in 1812 in the case of a minor enlisted in the United States Army. Chief Justice Kent expressed the opinion that the State court was without jurisdiction, but a majority of the court declined to concur in that opinion, while refusing the writ as a matter of discretion. The next year, however, the same eminent judge, writing the opinion of the unanimous court, ordered an attachment against General Morgan Lewis for refusing to produce before a Supreme Court commissioner on habeas corpus a soldier held by him upon a charge of treason.[31] Some years later the same court unanimously affirmed the jurisdiction of the Recorder of the City of New York to discharge on habeas corpus a soldier enlisted in the United States Army while an infant without the consent of his guardian.[32] In the meantime a similar conclusion had been reached in several of the States,[33] and the authority of State courts to discharge on habeas corpus prisoners from the custody of a Federal officer seems to have been generally recognized down to the time of the attempts to enforce the Fugitive Slave Law of 1850. The agitation caused by that law led to two decisions which were the subject of much debate half a century ago. The first of these was *Sim's Case*,[34] where Chief Justice Shaw was asked to grant a writ of habeas corpus to bring before him a fugitive slave captured by a United States marshal on the warrant of a United States commissioner on the ground that the law was unconstitutional. This he refused to do, sustaining the validity of the law and thus rendering it unnecessary to pass upon the question whether a State court might on habeas corpus take a prisoner out of the custody of a Federal officer. In the other case, that of *Ableman* v. *Booth*,[35] the Supreme Court of Wisconsin held the act to be unconstitutional and discharged a

[30](N. Y. 1812) 9 Johns. 239.

[31]Matter of Stacy (N. Y. 1813) 10 Johns. 328.

[32]In the Matter of Carlton (N. Y. 1827) 7 Cow. 471.

[33]Com. *v.* Cushing (1814) 11 Mass. 67; Matter of Pleasants (Va. 1834) 11 Am. Ju. 257; Com. *v.* Downes (1836) 24 Pick. 227; U. S. *v.* Wyngall (N. Y. 1843) 5 Hill 16; State *v.* Dimick (1841) 12 N. H. 194; and see cases collected in Hurdon Habeas Corpus (2nd Ed.) 155.

[34](1851) 7 Cush. 285.

[35](*Sub nom.*) *In re* Booth (1854) 3 Wis. 1; *In re* Booth and Rycraft, *ibid.* 157.

prisoner held under a warrant issued by a United States commissioner for aiding and abetting the escape of a fugitive slave, and also discharged the same persons from confinement after indictment and conviction in the United States District Court. From these judgments writs of error were taken to the Supreme Court of the United States, where the judgments were reversed.[36] Chief Justice Taney, referring to the writ of habeas corpus issued by the State court, said:[37]

"But, after the return is made, and the State judge or court judicially apprized that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of habeas corpus nor any other process issued under State authority, can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has commited an offense against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress. And although, as we have said, it is the duty of the marshal or other person holding him, to make known, by a proper return, the authority under which he detains him, it is at the same time imperatively his duty to obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to the mandate or process of any other government."

Notwithstanding the strong language of this opinion, State courts continued down to and during the Civil War, with much conflict of opinion, to discharge minors enlisted in the United States Army and Navy,[38] and even as late as 1871 Judge Gray, afterwards one of the Justices of the Supreme Court, declared that the doctrine that a State Court might on habeas corpus discharge a soldier under age enlisted in the United States Army without the consent of his guardian, was well settled.[39] The *Ableman* case[36] was distinguished as being limited to cases where the prisoner was confined under process and as not extending to the detention of a citizen by a mere executive officer, civil or military,

[36]Ableman v. Booth (1858) 21 How. 506.

[37]At p. 523.

[38]Phelan's Case (N. Y. 1859) 9 Abb. Pr. 286; Matter of Dobbs (N. Y. 1860) 21 How. Pr. 68; In the Matter of Barrett (N. Y. 1863) 42 Barb. 479; Reilly's Case (N. Y. 1867) 2 Abb. Pr. N. S. 334; In the Matter of Hopson (N. Y. 1863) 40 Barb. 34. See the authorities in both the Federal and State Courts cited by Blatchford, J., in *In re* Thomas H. Neill (1871) 8 Blatch. 156; and see the cases collected in Hurd on Habeas Corpus (2nd Ed.) 154.

[39]McConologue's Case (1871) 107 Mass. 154.

of the United States, without color of judicial process. However, in the very year of Judge Gray's decision, the Supreme Court of the United States put the whole question to rest in a very sweeping opinion in *Tarble's Case.*[40] In that case a soldier in the United States Army was discharged on habeas corpus by a Supreme Court commissioner of the State of Wisconsin on the ground that he had been unlawfully enlisted while a minor without the consent of his guardian. An extremely able and careful opinion was delivered by Judge Paine for the Supreme Court of Wisconsin.[41] The Supreme Court of the United States considered the general question presented, which it stated to be:[42]

"Whether any judicial officer of a State has jurisdiction to issue a writ of *habeas corpus,* or to continue proceedings under the writ when issued, for the discharge of a person held under the authority, or claim and color of the authority, of the United States, by an officer of that government."

To this the court made reply in the following language:[43]

"State judges and State courts, authorized by laws of their states to issue writs of *habeas corpus,* have undoubtedly a right to issue the writ in any case where a party is alleged to be illegally confined within their limits, unless it appear upon his application that he is confined under the authority, or claim and color of the authority, of the United States, by an officer of that government. If such fact appear upon the application the writ should be refused. If it do not appear, the judge or court issuing the writ has a right to inquire into the cause of imprisonment, and ascertain by what authority the person is held within the limits of the State; and it is the duty of the marshal, or other officer having the custody of the prisoner, to give, by a proper return, information in this respect. His return should be sufficient, in its detail of facts, to show distinctly that the imprisonment is under the authority, or claim and color of the authority, of the United States, and to exclude the suspicion of imposition or oppression on his part. And the process or order, under which the prisoner is held, should be produced with the return and submitted to inspection, in order that the court or judge issuing the writ may see that the prisoner is held by the officer, in good faith, under the authority, or claim and color of the authority, of the United States, and not under the mere pretense of having such authority.

"This right to inquire by process of *habeas corpus,* and the duty of the officer to make a return 'grows necessarily,' says Mr. Chief

[40](1871) 13 Wall. 397.

[41](1870) 25 Wis. 390.

[42]At p. 402.

[43]At pages 409-410.

Justice Taney, 'out of the complex character of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its power, and each within its sphere of action, prescribed by the Constitution of the United States, independent of the other. But, after the return is made, and the State judge or court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of *habeas corpus* nor any other process issued under State authority can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offense against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress.'"

This case settled two distinct propositions: first, that the State courts were without jurisdiction on habeas corpus when it was made to appear on the return that the prisoner was held under claim or color of the authority of the United States; and, secondly, as to this want of jurisdiction it was not material whether the claim and color of authority was under judicial process or statutory direction.

The fundamental proposition upon which the *Ableman*[36] and *Tarble*[40] cases rest is of great importance. It is that no State has power to interfere with a Federal officer in the discharge of his duties. It is true, as was argued in the *Ableman* case, that the Supreme Court of Wisconsin had general jurisdiction to pass upon the constitutionality of the Fugitive Slave Law. It had power to do this in any procedure which did not directly arrest the functions of the Federal government. No State can lawfully do an act which will suspend even for a moment the machinery of the national government. Courts of a State cannot use their general jurisdiction to pass upon the constitutionality or construction of a United States statute or treaty in such a way as to paralyze the performance of a duty enjoined by such a statute upon a United States official. The power fails the moment the hand of the State is laid upon a Federal agency and judicial control over that agency is within the exclusive jurisdiction of the Federal government. This is fundamental in our duplex system of government, in which the constitution and laws of the United States and treaties made under its authority are the supreme law of the land.

We may now return to a consideration of the jurisdiction

which the United States courts have to discharge on habeas corpus a person held by a State court for an act claimed by the accused to have been done by the authority of the United States or by a process of its courts. The statute provides that the court "shall proceed in a summary way to determine the facts of the case by hearing the testimony and arguments and thereupon to dispose of the party as law and justice require." What is the fact to be determined? Is it whether the party was acting under a claim or color of authority of the United States, or is it whether he was actually acting within his authority and had not overstepped it? And if the Federal judge finds that there is a conflict of evidence as to whether the act complained of was in excess of the authority of the officer, may he remand the prisoner to the custody of the State court, and has that court jurisdiction to determine that question? The opinions in the *Ableman* and *Tarble* cases seem to require as an answer that the fact to be determined is simply whether the accused was an officer of the United States, and whether he was in good faith exercising his office, and, if so, the duty of the Federal judge is to discharge; but if there be a conflict of fact, that conflict must be determined by the Federal judge, in order that he may dispose of the party as law and justice require. The first reported case arose twenty years after the statute (the "Force Bill") was passed, and under circumstances quite different from those to which it was intended to apply. The statute, as we have seen, was enacted to defeat an attempt to nullify the Federal revenue laws in the South; it was applied to prevent the nullification of the Fugitive Slave Law in the North. In the case referred to[44] it appeared that a justice of the peace in Pennsylvania issued a warrant for an assault against certain deputy marshals who, under process of the United States courts, had arrested a negro boy as a fugitive from labor. On habeas corpus Justice Grier discharged the marshals on the ground that they were acting under process of a Federal court. Subsequently, a civil suit was brought in the Supreme Court of Pennsylvania against the same persons in which they were arrested for the same alleged assault and were against discharged by a Federal judge.[45] They were arrested a third time on a bench warrant and an indictment for the same offense and were again brought before the Federal judge on habeas corpus. The judge then

[44] *Ex parte* Jenkins (1853) 2 Wall. Jr. 521.
[45] *Ibid.* 531.

proceeded to hear evidence as to whether they had transcended the rightful limits of their authority. The report does not show the final action, but doubtless the accused were discharged. A little later a circuit judge discharged on habeas corpus a Federal bailiff who had been arrested by a State officer on a charge of murder. The discharge was granted on the ground that the homicide was committed while the accused, acting under command of a United States marshal, was attempting to make an arrest under a warrant from a United States Court.[46] We next come to the memorable case of Neagle,[47] who was imprisoned upon a charge of murder under a warrant of a committing magistrate of the State of California for the killing of David S. Terry, when about to make an assault upon Mr. Justice Field. Neagle had been appointed a deputy by the marshal for the Northern District of California with special instructions to attend on Judge Field and protect him from assault on the part of Terry. He was brought before the Circuit Court on habeas corpus and discharged, after evidence had been taken as to the facts attending the killing of Terry. The questions determined were that Neagle was an officer of the United States, acting under authority of its laws, and that what he did was justified by the duty he was called upon to perform. The court found that he did no more than was necessary and proper for him to do, and hence was not only acting under authority of law, but within his authority. No intimation is made as to what action would have been proper if the evidence as to whether he was acting within his authority had been regarded as conflicting. Many cases have since arisen where prisoners held by State authorities have been discharged by Federal courts or judges on the ground that the act complained of was done under authority of the United States or the process of its courts.[48] In only two of the reported cases has a discharge been refused or the

[46]U. S. *ex rel.* Roberts *v.* Jailer of Fayette County (U. S. 1867) 2 Abb. 265; to the same effect U. S. *ex rel.* of Weeden (1877) 2 Flip. 76; *Ex parte* Sifford (1857) 5 Am. L. Reg. 659.

[47]*In re* Neagle (1889) 135 U. S. 1.

[48]United States *v.* Fullhart (1891) 47 Fed. 802; *Ex parte* Conway (1891) 48 Fed. 77; Kelly *v.* State of Georgia (1895) 68 Fed. 652; *In re* Waite (1897) 81 Fed. 359, aff'd (1898) 88 Fed. 102; *In re* Lewis (1897) 83 Fed. 159; *In re* Thomas (1897) 82 Fed. 304, aff'd (C. C. A. 1898) 87 Fed. 453, (1899) 173 U. S. 277; *In re* Weeks (1897) 83 Fed. 729; *In re* Comingore (1898) 96 Fed. 552, aff'd (1900) 177 U. S. 459; *In re* Fair (1900) 100 Fed. 149; Anderson *v.* Elliott (1900) 101 Fed. 609; United States *v.* Fuellhart (1901) 106 Fed. 911; *In re* Turner (1902) 119 Fed. 231; *In re* Matthews (1902) 122 Fed. 248; *In re* Laing (1903) 127 Fed. 213; *Ex parte* Schlaffer (1907) 154 Fed. 921; United States *v.* Lipsett (1907) 156 Fed. 65; Drury *v.* Lewis (1907) 200 U. S. 1; Hunter *v.* Wood (1908) 209 U. S. 205.

matter remanded to the State court.[49] In all the others the court has either found that the evidence left no doubt of the authority of the Federal officer to do the act complained of or the court itself resolved the doubt in favor of the authority. In some of the cases cited the question we are considering has been discussed. *In re Waite*[50] presents the precise question in a sharp and well defined manner. The prisoner who was an examiner in the pension bureau was indicted under the code of Iowa for a malicious threat to accuse a person of a crime in order to compel him to do an act against his will. He was tried and convicted, and upon appeal to the Supreme Court of the State his conviction was affirmed. He then sued out a writ of habeas corpus before the United States District Judge for the Northern District of Iowa, and was discharged. In that case it was held that where it appeared that the acts charged in the indictment were done by the defendant as an officer or agent of the United States in and about a matter within Federal control when engaged in duties imposed upon him by the laws of the United States, the State court was without jurisdiction to inquire whether he had overstepped the proper limits of his authority and to hold him amenable for a violation of a State law. This case was affirmed in the Circuit Court of Appeals.[51] The opinion of that court also asserts the necessity and propriety in every such case of discharging the accused in habeas corpus instead of remanding him to the custody of the State Court and putting him to a writ of error to the Supreme Court of the United States in the event of an adverse decision, following the doctrine laid down in *Ex Parte Royall*[52] that such cases present questions of such importance and urgency that the court which is appealed to for relief may and should discharge the prisoner by habeas corpus, instead of compelling him to resort to the slower process by appeal, provided that it finds upon an investigation of the case that the petitioner's complaint is well founded.[53]

*In re Waite* is cited with approval in *Easton* v. *Iowa*,[54] and *Ohio* v. *Thomas*.[55]

[49] *In re* Matthews (1902) 122 Fed. 248; Drury *v.* Lewis (1907) 200 U. S. 1. Cited in Note 48.

[50] (1897) 81 Fed. 359; *supra*, note 48.

[51] (*Sub nom.*) Campbell *v.* Waite (1898) 88 Fed. 102.

[52] (1886) 117 U. S. 241.

[53] Campbell *v.* Waite, *supra*, at p. 108.

[54] (1903) 188 U. S. 220.

[55] (1899) 173 U. S. 276.

There are also instances in which an officer of the United States is liable under Federal statutes to a criminal prosecution for the same act for which he is held criminally chargeable under a State law. Thus, under the military and naval code, a military or naval officer or a soldier or sailor may be subject to court martial for an act for which he may also be indicted under the State law. In such cases the exercise of the power of discharge upon habeas corpus by a Federal judge has sometimes been put upon the ground of the exclusive jurisdiction of the Federal authorities, in analogy to those cases in which it has been held that the courts of a State have no jurisdiction of the crime of perjury committed in an examination before United States officers under United States statutes.[56]

In *Tennessee* v. *Davis*,[57] where a revenue officer was indicted for murder in a State court and petitioned for removal of the prosecution into the United States court, which removal was granted and sustained, the Supreme Court said:[58]

"'The general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers.' It can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested, brought to trial in a State court for an alleged offense against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection,—if their protection must be left to the action of the State court,—the operations of the general government may at any time be arrested at the will of one of its members. * * *

"We do not think such an element of weakness is to be found in the constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No State government can exclude it from the exercise of any authority conferred upon it by the constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it."

It is impossible to read the cases on this subject without feeling that the courts have, in some instances, hesitated to apply the fundamental principle so distinctly stated in the *Ableman* and *Tarble*

[56] *In re* Fair (1900) 100 Fed. 149-157; *In re* Loney (1890) 134 U. S. 372.

[57] (1879) 100 U. S. 257.

[58] At pages 262-3.

cases. The reason for this is to be found in the fear that the mode of procedure open to the Federal courts upon habeas corpus may result in the discharge of a Federal officer who has so far exceeded his authority as to make himself properly liable under the criminal law of the State. A Federal judge might naturally feel reluctant to pass upon the question whether the officer had or had not exceeded his authority, where there is a conflict of evidence; and yet plainly that is not only a Federal question but it is a question which no other tribunal has authority to determine. To leave that question to the determination of the State court, even though it may be reviewed upon appeal to the Supreme Court, is to concede an authority inconsistent with the full exercise of the functions of the Federal government.

The instinctive feeling of the courts is suggested by the words of Judge Peckham, referring to the powers of the judge under this clause of the habeas corpus act.[59]

"It is an exceedingly delicate jurisdiction given to the Federal courts by which a person under an indictment in a State court and subject to its laws may by the decision of a single judge of the Federal court, upon a writ of habeas corpus, be taken out of the custody of the officers of the State and finally discharged therefrom, and thus a trial by the State courts of an indictment found under the laws of a State be finally prevented."

In the late case of *Drury* v. *Lewis*,[60] the Supreme Court of the United States seems to have laid down a doctrine difficult to reconcile with the *Abelman*[36] and *Tarble*[40] cases, or with the opinions expressed in *In re Waite*,[50] or in *Davis* v. *Tennessee*.[57] In that case a lieutenant and a soldier in the United States army were indicted in Pennsylvania on a charge of murder and manslaughter. It appeared that they were stationed at Allegheny Arsenal in Pittsburgh, and that thefts having been committed upon the Arsenal grounds and buildings, the commanding officer had directed the lieutenant to stop the depredations and establish a patrol. This he did, and the accused persons, in pursuance of this command, having received word that some persons were stealing copper from a building, undertook to arrest certain persons coming from the Arsenal, and in doing so fired shots which wounded and resulted in the death of one Crowley, for which the indictments

[59]Baker *v.* Grice (1897) 169 U. S. 284, 291.

[60](1906) 200 U. S. 1, aff'g S. C. (*Sub nom.*), United States *v.* Lewis (1904) 129 Fed. 823.

were obtained. It was claimed that Crowley had surrendered before the shots were fired. The Supreme Court said:[61]

"But there was a conflict of evidence as to whether Crowley had or had not surrendered and it is conceded that if he had, it could not reasonably be claimed that the fatal shot was fired in the performance of a duty imposed by the federal law, and the state court had jurisdiction.

"The Circuit Court was not called on to determine the guilt or innocence of the accused. That was for the state court if it had jurisdiction, and this the state court had, even though it was petitioner's duty to pursue and arrest Crowley (assuming that he had stolen pieces of copper), if the question of Crowley being a fleeing felon was open to dispute on the evidence; that is, if that were the gist of the case, it was for the state court to pass upon it, and its doing so could not be collaterally attacked."

In conclusion the Court said:

"We have repeatedly held that the acts of Congress in relation to habeas corpus do not imperatively require the Circuit Courts to wrest petitioners from the custody of state officers in advance of trial in the State courts and that those courts may decline to discharge in the proper exercise of discretion."

The cases cited by the Chief Justice in support of the last statement were none of them cases in which a habeas corpus was sought upon the ground that the petitioner was in custody for an act done in pursuance of the authority of the United States, or of a process of its courts. They were not cases of officers seeking to be discharged from imprisonment under State authority upon the claim that the act for which they were imprisoned was done in the course of official duty. They were cases of parties who complained that their individual rights under the constitution, laws or treaties of the United States were violated by their imprisonment under State authority, and, as we have said before, the issue made was one of which the State and Federal courts had concurrent jurisdiction, and it was therefore unquestionably within the competency of the Federal court in its discretion to leave the party to pursue his remedies in the State court and on appeal therefrom.

The *Ableman*[36] and *Tarble*[40] cases are not referred to in the opinion in the *Drury*[60] case. Can the latter case be harmonized with them, or with what was said in *Tennessee* v. *Davis*?[57] In the *Ableman* and *Tarble* cases the State court directed its

[61]At page 8.

habeas corpus to the Federal officer upon the assumption that it had jurisdiction to discharge a prisoner from his custody, and it was held that though the court had jurisdiction to grant the writ, yet it lost jurisdiction to proceed to enforce it against a Federal officer when it appeared that he was acting under claim of Federal authority. In the *Drury* case the State court acting under its general jurisdiction arrested a Federal officer for an offense under the State law, and that officer asserted on habeas corpus before a Federal judge by way of justification of his alleged offense that he was acting in pursuance of his authority as a Federal officer. It is said in the opinion that the State court had jurisdiction if the question of Crowley's being a "fleeing felon" was open to dispute on the evidence. In other words, the question whether the officer was acting within his authority, and, therefore, protected from arrest by the State court, depended upon whether Crowley was a "fleeing felon" and that this was for the State court to decide. The ground of the decision apparently is that whenever the evidence is disputable as to whether the act of the Federal officer was within his authority, the State court has jurisdiction to determine that question concurrently with the Federal court, and may exercise that jurisdiction to the extent of arresting and imprisoning the Federal officer. But this seems to be a conclusion incompatible with the paramount sovereignty of the Federal government over its own agencies and instrumentalities, for suppose it to be finally found that the Federal officer was acting within his right, then it will have transpired that an inferior sovereignty has arrested and imprisoned an officer of the paramount sovereignty while engaged in the performance of his duties, and thus far has interfered with the functions of the superior government. Moreover, while a court may have general jurisdiction of a subject, that jurisdiction may be limited as to certain persons or exigencies. Thus, by way of illustration, a State court has undoubted jurisdiction in certain cases to issue writs of attachment, and yet it has no power under that writ to sieze property in custody of the United States, and if it does, its jurisdiction or its power ceases and the act is void.[62] So, in the *Ableman*[36] and *Tarble*[40] cases, it was held that the jurisdiction of the State court terminated at the moment when the hand of violence was laid upon an officer of the Federal government claiming to act under its authority; and it is difficult to see why the same principle does not apply in

[62]Harris *v.* Dennie (1830) 3 Pet. 292.

equal force in the situations such as was presented by the *Drury*[60] case. If this be so, of course, the Federal court has no discretion to remand the officer for trial to the State court until after it has decided that the officer was not acting pursuant to Federal authority.

The questions presented are undoubtedly delicate and perplexing, for if the Federal judge is to determine the question of justification the accused must either be acquitted or, since the Federal judge has no power to convict and sentence, he must be returned to the State court for trial. Neither course is satisfactory. The one disposes of questions of fact without the aid of a jury, which, under our system, is the established tribunal for the determination of questions of fact. The other course leaves to the State court in the first instance not only the construction of Federal statutes but the determination of the duties and powers of Federal officers and their regulation and control, and the power to directly interfere with and stop the machinery of the Federal government.

Considering these questions, may we not ask why the mode of procedure should not be amended, and why the provisions now applicable to the removal of the trial or prosecution in a State court against revenue officers should not be extended to all officers of the United States? If this were done, in every instance where the accused set up the defense of justification under a Federal law or the process of a Federal court the cause could be instantly removed into the United States Circuit Court. That court could admit the accused to bail or discharge him on habeas corpus if the arrest seemed without probable cause, or it could proceed to trial. The questions of fact could then be disposed of by a jury and the questions of law relating to the duties, regulation and control of Federal officials would be passed upon, in the first instance, as well as in the last, by the courts of the United States.

We pass now to a brief consideration of the authority of a State court to enjoin Federal officers from proceeding in the performance of duties which they claim they are authorized or required to perform under authority of the United States or the decree or order of its courts. It may be assumed, perhaps, that in analogy to the want of power in a State court to issue a mandamus to a Federal officer, a State court is without authority to issue a mandatory injunction requiring a Federal officer to perform a duty imposed upon him by a Federal statute. No such

case has come to the attention of the writer, but it has been held that Federal courts have no power to issue a mandatory injunction requiring a State officer to perform a duty imposed upon him.[63] In *Brewer* v. *Kidd*[64] it was held in Michigan that a court of equity of that State had no jurisdiction to restrain the register and receiver of the land office from making sale of the public lands. The Court said:[65]

"We have been cited to no authority, and we are aware of none which would authorize a State court to issue an injunction restraining the register and receiver from making the sale advertised in the present case; and we can see no ground upon which such a jurisdiction could be maintained which would not also authorize the issuing of a mandamus by a State court, to compel the performance by the same officers of their official duties."

In the case reported under the title *In re Turner*[66] an action was brought by the owner of a tract of land to restrain the defendant, an officer of the United States Army, from continuing the construction of a sewer which, it was claimed, would pollute the waters of a stream and make the plaintiff's lands unfit for the pasturing of cattle. The court said that the substantial inquiry was whether a State court had jurisdiction in a proceeding brought for the sole purpose of enjoining an officer of the United States Army from doing the work which he had been commanded to perform by his superior officer in the execution of an act of Congress, and whether such officer could be enjoined by a State court, even though committing a wrong upon claimant's property, provided such act was being performed for or on behalf of the Government. The court vacated the injunction upon the ground of want of power in the State court to issue it and removed the cause to the United States Circuit Court.

Here again we encounter a difficulty arising from the mode of procedure open under the present Judiciary Act. It is well settled that an action cannot be brought in, nor removed from a State court to, the United States Circuit Court upon the ground that it presents a Federal question unless the fact that it arises under the constitution, laws or treaties of the United States appears on

[63]Kentucky *v.* Dennison (1860) 24 How. 66; McCauley *v.* Kellogg (1873) 2 Woods 13.

[64](1871) 23 Mich. 440.

[65]At page 446.

[66](1902) 119 Fed. 231.

the face of the complaint.[67] In an ordinary action against a Federal officer to enjoin a continuing trespass or other act threatened or being performed outside of official authority the complaint might not, and oftentimes, if properly drawn, would not, disclose any Federal question, since that would ordinarily be a matter set up by way of defense; and it has been repeatedly held, and may now be regarded as settled law, that the mere fact that it is made to appear upon the petition for removal that the action is brought against a Federal officer, and that he justifies the act complained of under the authority of a Federal law, does not give the court jurisdiction of the action either originally or upon removal.[68] The only instance in which an action may be brought in or removed to the United States Circuit Court, upon the sole ground that the defendant was claiming to act under authority of a Federal statute, is in the case of a revenue officer under the provisions of the "Force Bill," which are still retained as part of the existing law.[69] If then diverse citizenship does not exist, and the plaintiff brings an action in a State court upon a proper complaint which does not present a Federal question, but the action is brought against a Federal officer who justifies by way of answer under a Federal statute, there would seem to be at least a very grave doubt whether an injunction could be sustained in such an action by the State court though a proper case for such relief against a person other than a Federal officer were presented; and it is quite plain that the action could not have been brought in or removed to the United States Circuit Court. Perhaps this incongruous condition of affairs is more fanciful than real in actual experience. Does it not, however, suggest the advisability of so amending the Judiciary Act, both as to the original jurisdiction of the Circuit Court and as to removal, as to extend in effect the provisions of the existing law as to revenue officers, to all officers of the United States or persons justifying under the authority of the United States law or the process of its courts?

The jealousy with which the States at first regarded the national government has, to a large extent, passed away. The facilities of intercommunication have removed inconveniences

[67]Tennessee *v.* Bank (1894) 152 U. S. 454; Chappell *v.* Waterworth (1894) 155 U. S. 102; Sawyer *v.* Kochersperger (1898) 170 U. S. 303; Louisville, etc., R. R. Co. *v.* Mottley (1908) 29 Sup. Ct. 42.

[68]People's U. S. Bank *v.* Goodwin (1908) 160 Fed. 727; Walker *v.* Collins (1897) 167 U. S. 57.

[69]U. S. Rev. St. § 643.

which in early days attended litigation in the Federal courts. The mutual relations between the State and Federal courts have come to be regarded as the subject of critical and scientific study rather than of partisan or local debate. The result of all this is that there is not now any substantial difference of opinion as to the desirability of giving the Federal courts power to bring every subject relating to the functions of the Federal government, and the performance of their duties by Federal officers, in the first instance within the jurisdiction of the Federal courts. At the same time the extension of the activities of the national government and the large increase in the number of Federal officers require that the remedies of the individual against the abuse of power by such officers should be carefully secured. The right of the individual to judicial redress for wrongful official action injurious to his person and property is an essential element of civil liberty. "The very essence of civil liberty," says Chief Justice Marshall, "certainly consists in the right of every individual to claim the protection of law whenever he receives an injury." Considering these matters in connection with the history of the law which we have attempted briefly to review, the following inquiries may perhaps be properly regarded as suitable for legislative action:

First: Should not the Federal courts be given the power to issue writs of mandamus and certiorari as original writs?

Second: Should not any civil suit or criminal prosecution against any officer acting under the authority of the United States or of its courts be removable into the Circuit Court as civil suits and criminal prosecution against revenue officers are now removable under Section 643 of the Revised Statutes?

Third: Should not the use of the writ of habeas corpus in such cases be limited so that it shall be ancillary to such removal only?

JAMES L. BISHOP.

NEW YORK.